Supreme Court, U.S.
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In The

Supreme Court of the United States

OPAL KATE MILES, a/k/a KATE O. MILES,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR A WRIT OF CERTIORARI

TIMOTHY A. HOOTMAN
Counsel of Record for Petitioner
2402 Pease Street
Houston, Texas 77003
713.247.9548

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The lower courts held that the petitioner's constitutional right was violated when the jury was twice told by the prosecutor and the trial court judge that her presumption of innocence ceased at the close of evidence.

i. Did the Texas Court of Criminal Appeals err in concluding that the constitutional violation was not a structural defect?

ii. Did the Texas Court of Criminal Appeals err in concluding that the constitutional violation was harmless?

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OPINIONS BELOW

The Fourteenth Court of Appeals at Houston, Texas issued a published opinion in this case that is reported at *Miles v. State*, 154 S.W.3d 679 (Tex. App. – Houston [14th Dist.] 2004). That opinion is attached hereto as Appendix 2.

The Texas Court of Criminal Appeals at Austin, Texas issued a published opinion in this case that is reported at *Miles v. State*, 204 S.W.3d 822 (Tex. Crim. App. 2006). That opinion is attached hereto as Appendix 1.

STATEMENT OF JURISDICTION

On August 14, 2003, a judgment of conviction was signed by the 263rd District Court of Harris County, Texas, whereby the petitioner was adjudged guilty of felony theft and sentenced to nine years in prison and a $2,500.00 fine after a trial by jury. The judgment was timely appealed to the Fourteenth Court of Appeals at Houston, Texas. On November 4, 2004, the Fourteenth Court of Appeals issued its opinion and judgment affirming the trial court's judgment. On November 29, 2004, the petitioner filed a motion for extension to file a motion for rehearing. On the same day, November 29, 2004, the petitioner also filed a motion for rehearing. The motion for extension was granted, and later, on January 13, 2005, the Fourteenth Court of Appeals overruled the motion for rehearing without written opinion.

On February 7, 2005, the petitioner filed a petition for discretionary review with the Texas Court of Criminal Appeals. The petition was granted, and on October 25, 2006, the Texas Court of Criminal Appeals issued its

opinion and judgment affirming the judgment of the Court of Appeals.

The petitioner believes that 28 U.S.C. § 1257 confers jurisdiction on this Court to review on a writ of certiorari the judgment in question.

CONSTITUTIONAL PROVISIONS INVOLVED

The following Constitutional provisions are involved in this case:

> The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."
>
> The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."
>
> The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

1. Proceedings wherein the federal questions sought to be reviewed were raised.

The petitioner was prosecuted in State court for theft of a large amount of money. During the trial the jury was

given the following instruction on the presumption of innocence:

> All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that she has been arrested, confined, or indicted for, or otherwise charged with the offense give rise to no inference of guilt at her trial. The law does not require a defendant to prove her innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The petitioner's presumption of innocence was twice violated in the closing arguments when the following exchange took place in front of the jury:

Petitioner's lawyer: One thing I do want to remind you of at this time is that there is a presumption of innocence throughout the trial. At this point in time, by law, my client is presumed to be innocent. And that –

The State: Judge, I'm going to object to that. Not after the trial's over, I wouldn't think. That's the presumption before the trial starts.

The Court: Sustained.

Petitioner's lawyer: Well, this Jury has not rendered its verdict. And until you render verdict, that presumption of innocence, I render to you, is in effect.

The State: I object to that as not a proper statement of the law.

The Court: Sustained. Let's move on. (RR Vol. 5, pp. 180-181).[1]

On appeal, the Fourteenth Court of Appeals held that the petitioner's presumption of innocence was violated but that the error was harmless. *Miles*, 154 S.W.3d at 682-83. *See App.* 2. The petitioner filed a motion for rehearing arguing that the Court of Appeals should reconsider its holding that the error was harmless because the error in question was a structural defect as contemplated by the federal constitution and the United States Supreme Court jurisprudence. The motion was overruled without opinion. The petitioner then filed a petition for discretionary review in the Texas Court of Criminal Appeals and again argued that the error in question was a structural defect as contemplated by the federal constitution and the United States Supreme Court jurisprudence.

The Texas Court of Criminal Appeals granted the petition for discretionary review and issued an opinion agreeing with the Court of Appeals that the petitioner's constitutional right to a presumption of innocence was violated. The Court also specifically held that (1) the error was not a structural defect as contemplated by the federal constitution and the United States Supreme Court jurisprudence, and (2) that the error was harmless. *Miles*, 204 S.W.3d at 827-28. *See App.* 1.

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[1] "CR" herein means Clerk's Record; "RR" means Reporter's Record.

2. Facts developed at trial and material to consideration of the questions presented.

An indictment alleged that the petitioner committed theft, through a scheme and continuing course of conduct, of over $20,000.00 but under $100,000.00 between April 29, 1998, and February 29, 2000, from The Hope Foundation for Retarded Children and Claire Hollins. (CR 2). The case was based on circumstantial evidence. The thrust of the evidence, from the State's point-of-view was that an outside audit of the Foundation's records and accounts showed that checks had been written directly to the petitioner, that she lived outside her means, and that she acted strangely during the audit when questions were raised regarding the review of the Foundation's finances. The petitioner's case consisted of an explanation that the direct checks to her were for reimbursement, a refutation of the claim that she lived outside her means, and a denial that she acted strangely – that such statements were subjectively erroneous failures of perception on the part of the State's witnesses.

The record is large and there are many voluminous exhibits. For example, ten witnesses testified on behalf of the State, comprising four volumes of testimony. Also, there are reams and reams of physical evidence consisting of photographs of the Foundation, organizational flowcharts of the Foundation, lunch menus of the children staying at the Foundation, May wage and tax statements for the year 1999, many returned checks from the Foundation's accounts, an audit report, and accounting ledgers of the Foundation for the years 1999 and 2000. From this barrage of information, the following essential facts were developed during the trial and used as the focal point in

opening and closing arguments of the State and the defense.

Kathy Smith, an outside auditor, was contacted by Sheri Warminski of the Foundation to conduct an audit for the years 1998 and 1999. (RR Vol. 1, p. 142). In testifying, she explained the professional steps that an auditor takes in ascertaining the finances of the particular accounts at hand. (RR Vol. 1, pp. 143-147). She started her audit the first week of November 1999, thru 2001. (RR Vol. 1, pp. 147 and 149). The petitioner was one of the first people that Ms. Smith met at the Foundation. (RR Vol. 1, p. 149). She stated that the petitioner was the primary person she dealt with during the audit. (RR Vol. 1, pp. 152-153). She described how she went about gathering information needed for the audit from the petitioner. (RR Vol. 1, pp. 152-154). She described problems in the Quickbooks records used by the Foundation, such as checks not being listed and numbers of checks being skipped. (RR Vol 1, pp. 154-156). She described how it appeared that things had been altered or changed. (RR Vol. 1, pp. 162-164). Other witnesses called by the State testified as the prosecutor built on this backdrop always circumstantially trying to tie the petitioner into the financial woes of the Foundation.

The petitioner testified and described her educational background. (RR Vol. 4, pp. 173-177). She explained to the jury the different vehicles that she had, the prosecution having already suggested that the vehicles she drove were too expensive for her pay-rate at the Foundation. (RR Vol. 4, pp. 178-180). She explained her duties at the Foundation, which included bookkeeping, accounting, payroll, and frequent meetings with the board of the Foundation. (RR Vol. 4, pp. 191-194). The petitioner testified about the specifics of the accounts in question and described how the

day-to-day operations of the accounts worked. (RR Vol. 4, pp. 196-202). She was asked how and why checks were written to her, and she explained that the money was to pay for over night trips that she had taken with 40 to 50 of the children that lived at the Foundation. (RR Vol. 4, pp. 203-204). She further explained that she would write checks to herself as reimbursement for expenses that she had paid on behalf of the children and the Foundation. (RR Vol. 4, pp. 204-213).

In their closing arguments, the lawyers for the State and the petitioner took diametric views of what conclusion the evidence drew. The State arguing that the petitioner systematically and with specific criminal intent contrived a scheme and design to steal from the Foundation and hide her evil deed after the fact once the auditor's began their survey of the financial landscape of the Foundation. (RR Vol. 5, pp. 175-177, 183-192). The petitioner's lawyer argued essentially the opposite, that there was absolutely nothing improper or sinister about what the petitioner had done, that the documentary evidence did not establish that she had done anything inherently improper. During the petitioner's closing argument the trial court erroneously admonished the jurors as the prosecutor made a speaking argument that the petitioner's presumption of innocence ceased to exist upon the close of evidence. The verbatim exchange is stated above.

Miles was found guilty and sentenced, by the jury, to nine years in prison and a $2,500.00 fine. (CR 69-70).

REASONS FOR GRANTING THE WRIT

A. The holding by the Texas Court of Criminal Appeals that the violation of the petitioner's presumption of innocence was not structural error was reached in a way that: (1) conflicts with relevant decisions of this Court; (2) conflicts with decisions from United States Courts of Appeals; and (3) that conflicts with other courts.

The holding of the Texas Court of Criminal Appeals in this case, that the violation of the petitioner's presumption of innocence was not a structural error, is an important federal question that has not been, but should be, settled by this Court. The Texas Court's opinion was decided in a way that conflicts with the following relevant decisions of this Court: *Sullivan v. Louisiana*, 508 U.S. 275 (1993); *Lakeside v. Oregon*, 435 U.S. 333 (1978); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Estelle v. Williams*, 425 U.S. 501 (1976); *In re Winship*, 397 U.S. 358 (1970); *Coffin v. United States*, 156 U.S. 432 (1895).

The Texas Court's opinion also conflicts with the following decisions from United States courts of appeals: *United States v. Gaines*, 457 F.3d 238 (2nd Cir. 2006); *United States v. Yakubowicz*, 427 F.3d 144 (2nd Cir. 2005); and *Mohoney v. Wallman*, 917 F.2d 469 (10th Cir. 1990).

The opinion also conflicts with the following federal and state decisions: *Pagano v. Allard*, 218 F.Supp.2d 26 (D. Mass. 2002); and *Nurse v. State*, 932 So.2d 290 (2d D.C.A. 2005).

The foregoing cases are discussed below. Also, the confusion generally in the lower courts with respect to what factors and basic underlying principles should be

applied to making the determination of whether constitutional error is a structural defect, specifically in the context of presumption of innocence error, is discussed below. The point made is that because of the conflicts with the relevant decisions of this Court on an important federal question that should be resolved by this Court, and because of the conflicts in the lower courts, this petition should be granted to address the issues raised by this case.

B. The jury was erroneously informed by the prosecutor and trial court, over objection, that the presumption of innocence terminated after presentation of the evidence and did not continue during deliberations.

The petitioner's constitutional presumption of innocence was twice violated in the trial of this case. The issue surfaced when the petitioner's lawyer, while giving his closing argument, was explaining that the State's burden of overcoming the presumption of innocence beyond a reasonable doubt continued "throughout trial." At that point, the prosecutor made the erroneous speaking objection that the presumption of innocence ended upon the conclusion of the evidence. The trial court sustained the objection in front of the jury, twice. The jury, therefore, was erroneously informed by the prosecutor and the trial court that the presumption of innocence ceased to exist after presentation of evidence. The error was not ameliorated by the jury charge which only stated that the petitioner was presumed innocent unless each element of the offense is proved beyond a reasonable doubt; it did not tell the jurors when the presumption ceased to exist.

Under the charge, the jurors were at their discretion to determine when the offense was proved. If they determined that the offense had been "proven" at the close of the evidence, or some time earlier, then logically, the presumption did not carry into the jury deliberations. This is a clear violation of the law because the presumption of innocence disappears only when "the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears." *Delo v. Lashley*, 507 U.S. 272, 278 (1993). The presumption does not disappear before a finding of guilt, and therefore, the petitioner's presumption of innocence here was violated by the jury being improperly instructed that the presumption ceased at the close of the evidence.

C. The Texas Court of Criminal Appeals held that the two violations of the petitioner's constitutional right to a presumption of innocence were not a structural defect.

The intermediate Fourteenth Court of Appeals of Texas held that the petitioner's presumption of innocence was twice violated, but that the error was harmless. *Miles*, 154 S.W.3d at 682-83. The Texas Court of Criminal Appeals agreed. *Miles*, 204 S.W.3d at 286-87. In also specifically holding that the error was not a structural defect, the Texas Court of Criminal Appeals said:

> [The petitioner] argues that the trial court's error in this case was a structural defect and that, therefore, the court of appeals erred in applying the Chapman harmless-error rule to it. We disagree. In our view, the trial court's error did not rise to level (sic) of a structural defect; rather, it was a classic trial error . . . readily subject to a

quantitative assessment for harm within the context of the entire trial. *Id.*

D. The presumption of innocence and the reasonable doubt requirement serve the same purpose and derive from the same historical background. This Court has acknowledged that historical background as bearing on the fundamental importance of the presumption of innocence. The lower court's conclusion that the error in question was not a structural defect is based in part on a disregard of the history of the presumption and the erroneous premise that the presumption of innocence and the reasonable doubt requirement are separable principles.

The presumption of innocence is the starting point of any criminal prosecution. As is universally known, the accused is presumed innocent until the Government has presented proof beyond a reasonable doubt as to each of the essential elements of the offense charged.[2] In that regard, the presumption of innocence and reasonable doubt are tandem and therefore inseparable. Even their constitutional histories are similar in that the presumption of innocence and reasonable doubt are not explicitly contained in the constitution but rather implicitly found in the due process clause.[3] For example, one of the two

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[2] *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) ("The government must prove beyond a reasonable doubt every element of a charged offense.").

[3] *Estelle*, 425 U.S. at 503 ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."); *In re Winship*, 397 U.S. 358, 362 (1970) (stating that the right of the defendant to require the State to prove its case beyond a reasonable doubt is implicit in the due process clause).

purposes of the presumption of innocence is that it "allocates the burden of proof in a criminal trial,"[4] which is the precise function of the reasonable doubt requirement. Because the presumption of innocence and reasonable doubt operate together, an intelligent discussion of the presumption of innocence cannot be made without an understanding of reasonable doubt.

The ancient roots of reasonable doubt and it's quintessential importance as a tool to insure a fair trial is discussed at length in *In re Winship*, 397 U.S. 358 (1970). It is not a surprise that the presumption of innocence, like reasonable doubt, has ancient roots and is also considered basic and fundamental to a fair criminal trial. In this regard, this Court noted in 1877:

> In criminal cases the true rule is that the burden of proof never shifts; that in all cases, before a conviction can be had, the jury must be satisfied from the evidence, beyond a reasonable doubt . . . that the defendant is guilty. . . . [And] in criminal trials the party accused is entitled to the legal presumption in favor of innocence, which, in doubtful cases, is always sufficient to turn the scale in his favor. *Lilienthal v. United States*, 97 U.S. 237, 266 (1878) (citations omitted).

In *Coffin*, 156 U.S. 432, this Court delves into the historical roots of the presumption of innocence and says they are traceable to Deuteronomy, Spartan and Athenian

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[4] *Wolfish*, 441 U.S. at 533 ("[I]t also serves as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial.").

Law, Roman Law, and eventually to English and then American common law.[5] *Id.* at 453-56.[6] *Coffin* states the presumption as follows:

> The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. *Id.* at 453.[7]

What reasonable doubt actually means, from a definitional perspective, has vexed the courts for many years.

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[5] The case goes on to explain some of the historical policy justifications for the presumption and cites, among others things, Blackstone's famous maxim that "it is better that ten guilty persons escape than that one innocent suffer." As an aside, this maxim has been called Blackstone's Ratio – 1:10 – and has been discussed by many European thinkers in the context of human suffering by an unchecked criminal justice system. *E.g.*, Voltaire, "Collected Works of Voltaire," *Zadig, or Fate,* Ch. 6, p. 12 (Walter J. Black, Publisher, The Giant International Series) (1927) ("It is to him that the nations are indebted for this grand principle, to wit, that it is better to run the risk of sparing the guilty than to condemn the innocent. He imagined that laws were made as well to secure the people from the suffering of injuries as to restrain them from the commission of crimes."); Leo Tolstoy, *Resurrection*, Ch. 28, p. 327 (The World Classics, Oxford University Press) (1994) ("So not only was the rule disregarded, that ten guilty should escape rather than one innocent be condemned, but, on the contrary, for the sake of getting rid of one really dangerous person, ten who were not dangerous were punished, just as, when cutting a rotten piece out of anything, one cuts away also some that is good.").

[6] *See also,* Kenneth Pennington, "Innocent Until Proven Guilty: The Origins of a Legal Maxim," *The Jurist* 63 (2003) 106-24 (Following the historical trial of the presumption of innocence from Thirteenth Century Europe to modern American usage and the United Nations incorporation of the principle in the Declaration of Human Rights in 1948 under article eleven, section one.).

[7] *See also, Taylor v. Kentucky*, 436 U.S. at 483 (quoting *Coffin*, 146 U.S. at 453) and at 491 (J. Stevens, dissenting opinion) ("[T]he rule in *Coffin* is surely sound."); *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

Victor v. Nebraska, 511 U.S. at 22; *Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (per curiam); *Taylor v. Kentucky*, 436 U.S. 478, 488 (1978). What it means, from a pragmatic perspective, is obvious: The State will have a difficult burden, intended to assist the accused. Both the presumption of innocence and reasonable doubt are meant to operate as one in this regard. This idea is elaborated on by Justice Stevens' dissenting opinion in *Lakeside v. Oregon*:

> Experience teaches us that most people formally charged with crime are guilty; yet we presume innocence until the trial is over. Experience also justifies the inference that most people who remain silent in the face of serious accusation have something to hide and are therefore probably guilty; yet we forbid trial judges or juries to draw that inference. The presumption of innocence and the protections afforded by the Due Process Clause impose a significant cost on the prosecutor who must prove the defendant's guilt beyond a reasonable doubt without the aid of his testimony. That cost is justified by the paramount importance of protecting a small minority of accused persons – those who are actually innocent – from wrongful conviction. 435 U.S. at 342-43 (Stevens, J., dissenting).[8]

The meaning of presumption of innocence, like reasonable doubt, is difficult to articulate because of its transcendent importance to the operation of the criminal justice system (and for society as a whole). Presumption of

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[8] *See also*, *Taylor*, 436 U.S. at 485 ("[O]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.").

innocence and reasonable doubt are convenient and familiar phrases that signal a larger, almost metaphysical concept and ethical valuation. In this regard, it should be noted that the criminal justice system has three purposes: to ascertain truth;[9] to prevent oppression by the Government;[10] and to seek the greater transcendental good.[11] The presumption of innocence and reasonable doubt are fundamental laws that prevent oppression by the Government and hinder the ascertainment of truth for the greater good of implementation of Blackstone's Ratio. *See* note 4, *supra*.

Both lower court opinions in this case overlook this important history; they also overlook that the presumption of innocence is inseparable from the reasonable doubt requirement. Consequently the lower courts significantly understate the importance of the presumption

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[9] *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 2593 (1986) (Powell, J., concurring in judgment); *United States v. Leon*, 468 U.S. 897 (1984); *Tehan v. United States*, 382 U.S. 406 (1966) ("The basic purpose of a trial is the determination of truth.")

[10] *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (The jury trial is to "'guard against a spirit of oppression and tyranny on the part of the rulers,'" and to serve "'as the great bulwark of [our] civil and political liberties'" (alteration in original (quoting 2 Joseph Story, Commentaries on the Constitution of the United States 540-41 (Boston, Little, Brown 4th ed. 1873)); *Williams v. Florida*, 399 U.S. 78, 100 (1970) ("purpose of the jury trial, as noted in Duncan, is to prevent oppression by the Government"); *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) ("right to jury trial is granted to criminal defendants in order to prevent oppression by the Government").

[11] *Herrera v. Collins*, 506 U.S. 390, 398-99 (1993) (Listing mechanisms that interfere with the truth finding function and stating that we "as a people have deliberately chose to adopt laws which interfere with the truth seeking function of the criminal trial" for a greater good.)

of innocence. *Miles*, 204 S.W.3d at 825-26; *Miles*, 154 S.W.3d at 683-84 (Hudson, J., concurring). This understatement is a direct predicate to the lower courts' conclusion that the error in question is not a structural defect. This conclusion conflicts with this Court's opinions regarding the fundamental importance of the presumption of innocence. In this regard, the lower court opinions cannot be reconciled with this Court's jurisprudence regarding the presumption of innocence and reasonable doubt. *Compare Miles*, 204 S.W.3d at 825-26 and *Miles*, 154 S.W.3d at 683-84 (Hudson, J., concurring), *with Sullivan*, 508 U.S. 275, *Wolfish*, 441 U.S. 520, *Lakeside*, 435 U.S. at 342-43 (Stevens, J., dissenting), *Estelle*, 425 U.S. 501, and *Winship*, 397 U.S. 358, *Coffin*, 156 U.S. 432.

E. Three factors exist which can independently or conjointly influence whether a particular constitutional error is categorized as a structural defect. *Factor 1*: Whether fundamental fairness is absent because of the error. *Factor 2*: Whether the effect of the error can be ascertained through harmless-error analysis. *Factor 3*: Whether the right violated serves an important function aside from ensuring a reliable verdict. The opinions of this Court, the federal circuit courts, and the state courts are not in agreement as to how, when, or whether these factors are used in determining if a constitutional error is a structural defect.

Once an appellate court has determined that error is constitutional it must next determine if the error falls under the category of violations subject to the harmless error rule or instead falls in that category of errors requiring automatic reversal. *Chapman v. California*, 386

U.S. 18, 22-24 (1967). If the error is categorized as a "trial error" it is subject to the harmless error rule; if categorized as a "structural defect" it is per se reversible. *Arizona v. Fulminante*, 499 U.S. 279, 307-10 (1991).

As a general principal, trial errors occur "during presentation of the case to the jury" and their effect may be "quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." *Id.*, 499 U.S. at 307-308. On the other hand, structural defects affect the "entire conduct of the trial from beginning to end," *id.*, at 309-310, "render a trial fundamentally unfair," *Rose v. Clark*, 478 U.S. 570, 577 (1986), and are "necessarily unquantifiable and indeterminate," *Sullivan*, 508 U.S. at 282, such that "any inquiry into [their] effect on the outcome of the case would be purely speculative," *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988). Structural defects "defy analysis by 'harmless error' standards," *Fulminante*, 499 U.S. at 309, and "are so intrinsically harmful as to require automatic reversal . . . without regard to their effect on the outcome," *Neder v. United States*, 527 U.S. 1, 7 (1999); *see also Washington v. Recuenco*, 126 S.Ct. 2546, 2551 (2006).

There are three circumstances under which a constitutional error will be categorized as a structural defect: (1) fundamental fairness is absent because of the error;[12] (2) the effect of the error cannot be ascertained

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[12] *E.g.*, *Satterwhite*, 486 U.S. at 256 ("Some constitutional violations, however, by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless.").

through harmless-error analysis;[13] and (3) the right violated serves an important function aside from ensuring a reliable verdict.[14] This Court has disagreed over how these factors apply to particular cases. *E.g., Gonzalez-Lopez*, 126 S.Ct. at 256 and at 2570 (Alito, J., dissenting). Moreover, the cases do not always clearly articulate what is the basis of the determination that the particular error in question is a structural defect. However, it is clear from the Court's holdings and statements in the opinions that such a tripartite distinction is important in determining if a particular error is a structural defect and not a trial error. This Court's decisions also reflect that an error categorized as structural may be founded upon a combination of the above three factors. The following are examples of cases from this Court based in whole or part upon the above three factors:

Fundamental-fairness cases. The following cases concluded that the error in question was a structural defect and are based on a determination that the defendant was denied a fundamentally fair trial because of the error in question:

- Defective reasonable doubt instruction.[15]
- Proceeding to trial with a judge that has no authority to try such a case.[16]

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[13] *E.g., United States v. Gonzalez-Lopez*, 126 S.Ct. 2557, 2564 n.4 (2006) ("[H]ere, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error.").

[14] It is also possible for Congress to determine that a particular error is not subject to the harmless error rule. *E.g., Zedner v. United States*, 126 S.Ct. 1976, 1989-1990 (2006) (holding that Congress repealed the harmless error rule as to its application regarding the Speedy Trial Act).

[15] *Sullivan*, 508 U.S. at 280-81.

[16] *Gomez v. United States*, 490 U.S. 858 (1989).

- Legally insufficient evidence.[17]
- Defense attorney conflict of interest throughout trial.[18]
- Guilty plea with no record showing the defendant was properly admonished.[19]
- Conviction based on invalid prior convictions.[20]
- No counsel provided at arraignment that affected the entire trial because defenses that were not asserted were irretrievably lost.[21]
- Total deprivation of the right to counsel.[22]
- A trial presided over by a biased judge.[23]

Unascertainability-of-the-effect-inquiry cases. The following cases conclude that the error in question was a structural defect and are based on the determination that the effect of the error could not be readily ascertained:

- Purposeful discrimination in the jury selection.[24]
- Grand jurors systematically excluded based on race.[25]
- The right to a trial open to the public violated.[26]

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[17] *Jackson v. Virginia*, 443 U.S. 307 (1979).

[18] *Holloway v. Arkansas*, 435 U.S. 405 (1978).

[19] *Boykin v. Alabama*, 395 U.S. 238, 244 (1969).

[20] *Burgett v. Texas*, 389 U.S. 109 (1967).

[21] *White v. Maryland*, 373 U.S. 59 (1963).

[22] *Glasser v. United States*, 315 U.S. 60, 76 (1942).

[23] *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

[24] *Batson v. Kentucky*, 476 U.S. 79, 100 (1986); *Whitus v. Georgia*, 385 U.S. 545, 549-50 (1967).

[25] *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986).

[26] *Waller v. Georgia*, 467 U.S. 39, 49-50 & n.9 (1984).

- Certain instructions that create an improper presumption.[27]
- Inherently adverse publicity that tainted the defendant's trial.[28]

Important-function cases. The following cases conclude that the error in question was a structural defect and are based on the particularly important function that would have been furthered absent the error in question:

- Denial of right to proceed pro se preserves the important function of allowing the defendant to control his own destiny;[29]
- Exclusion of jurors on the basis of race preserves the important function of preservation of the jurors' rights of equality;[30]
- Automatic reversal where a biased judge presides over a case serves the important function maintaining judicial integrity.[31]

The federal circuits and the lower state courts apply these three factors in a haphazard, unpredictable, and inconsistent manner – and often not at all – when confronted with determining whether a particular error is

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[27] *Connecticut v. Johnson*, 460 U.S. 73 (1983).

[28] *Sheppard v. Maxwell*, 384 U.S. 333, 351-52 (1966).

[29] *McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1984) ("The right to appear pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense.")

[30] *United States v. Mechanik*, 475 U.S. 66 (1986) ("[R]acial discrimination in the selection of grand jurors is so pernicious, and other remedies so impractical, that the remedy of automatic reversal was necessary as a prophylactic means of deterring grand jury discrimination in the future.").

[31] *Tumey*, 273 U.S. 510, 535.

a structural defect. When specifically presented with application of whether a presumption of innocence error is a structural defect the lower courts are likewise splintered and unpredictable as the following discussion shows.

F. This Court has left open the possibility that where a jury is given erroneous information regarding the presumption of innocence, the error may be a structural defect. Moreover, the lower federal circuits and the state courts are split over how to resolve the harm aspects of a presumption of innocence violation.

An instruction on the presumption of innocence must be given to a jury when requested by the accused.[32] Failure to give a presumption of innocence instruction when requested has been held to be subject to the harmless error rule.[33] This Court has never addressed whether the situation presented in this case, namely, whether the

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[32] *Taylor*, 436 U.S. at 490 ("We hold that on the facts of this case the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment.").

[33] *Kentucky v. Whorton*, 441 U.S. 789, 789-90 (1979) ("[The lower court] erred in interpreting *Taylor* to hold that the Due Process Clause of the Fourteenth Amendment absolutely requires that an instruction on the presumption of innocence must be given in every criminal case. The court's inquiry should have been directed to a determination of whether the failure to give such an instruction in the present case deprived the respondent of due process of law in light of the totality of the circumstances."). *See also, Fulminante*, 499 U.S. at 291 ("A jury instruction on the presumption of innocence is not constitutionally required in every case to satisfy due process, because such an instruction merely offers an additional safeguard beyond that provided by the constitutionally required instruction on reasonable doubt.").

harmless error rule is applicable where the jury has been erroneously instructed regarding the presumption of innocence. The Court has left open the possibility that a structural defect can result from a violation of the right to a presumption of innocence such as where the jury is erroneously informed regarding the presumption, *see Fulminante*, 499 U.S. at 291, which is what occurred in this case.

Sullivan is instructive in the context of the type of error presented in this case. There this Court held that the reasonable doubt instruction in question, which erroneously defined reasonable doubt, was a structural defect. 508 U.S. at 281-82. In that regard, the Court said that the defective instruction in that case "vitiates *all* the jury's findings," *id.*, at 281 (emphasis in original), and produces "consequences that are necessarily unquantifiable and indeterminate," *id.*, at 282. The Court further reasoned that the defective reasonable doubt instruction rendered harmless-error analysis upon the constitutionally required verdict of guilt beyond a reasonable doubt impossible – the reasonable doubt instruction being defective, a verdict of guilt beyond a reasonable doubt did not in fact even exist. *Id.*, at 280.

The Texas Court of Criminal Appeals dealt with *Sullivan* in this case by stating that the "reasoning in Sullivan is not applicable to the instant case," *Miles*, 204 S.W.3d at 827, and explained itself as follows:

> Here, the jurors were not given an erroneous instruction, either written or oral, that might have led them to convict on the basis of a degree of proof less than beyond a reasonable doubt. Indeed, appellant's jury was given completely accurate and thorough written instructions

> concerning the State's burden of proof and the requisite standard of proof. The most that can be said is that appellant's jury heard the trial court erroneously sustain, in rapid succession, two prosecutorial objections that, from a lay juror's point of view, probably were of uncertain significance. Any uncertainty in the juror's minds created by the trial court's actions most likely was cleared up by the written jury charge. *Id.*

These conclusions are inaccurate at several levels and are in direct conflict with other courts that have considered the very same and similar issues. The following cases are examples.

In *Pagano v. Allard*, the court was confronted with almost exactly the same facts as those presented in this case. 218 F.Supp.2d at 31. Specifically, the prosecutor stated the following in closing argument:

> To me this is probably one of my favorite times of the trial . . . do you remember when we first began the trial, the Judge talked about a legal concept called the presumption of innocence? And this defendant like every other defendant in this country enjoys the protection of that legal concept called presumption of innocence.
>
> But *now* as we come to the end of this trial, the presumption of innocence, which I sometimes characterize as somebody wearing like a cloak, and that's how he's protected by wearing that cloak, but *now that cloak comes off*. And now, you people get to judge. You guys get to decide the facts in this case. For me this is where it gets good. *Id.*, at 31 (emphasis in original).

Although no objection was made, the court held that the error "regarding the presumption of innocence 'so infected

the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.*, at 36 and 38. The court in *Pagano* focused on the fairness of the trial.

In *Mohoney v. Wallman*, the prosecutor made comments during voir dire that had the effect of undermining the presumption of innocence by informing the jury that (1) the presumption did not carry through deliberations, and (2) the presumption "is distinguished only upon the jury's determination that guilt has been established beyond a reasonable doubt." 917 F.2d at 471 n.2. This is the exact effect of the error in the petitioner's case. The court in *Mohoney* concluded that the error did effect the fundamental fairness of the trial. *Id.*, at 473 ("Since the essence of the error in the prosecution's comments here was that they conveyed to the jury the idea that the presumption had been eliminated from the case prior to deliberations, we conclude that petitioner's rights were affirmatively denied within the meaning of *Donnelly* in a manner that the rights of the defendant in *Whorton* simply were not.").[34] There was a dissenting opinion which concluded that "[c]onsidering the entire proceedings, the prosecutor's arguments, while perhaps improper, did not render defendant's trial so fundamentally unfair as to deny him due process." *Id.*, at 476.

In *United States v. Yakubowicz*, the panel was in agreement that it was error to allow the Government to make summation comments at the conclusion of each

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[34] *Donnely v. De Christoforo*, 416 U.S. 637, 643 (1974) (stating that where a prosecutor's improper remarks do not infringe upon a constitutional right, the question is whether the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process.").

witness's testimony. 427 F.3d at 152-53 ("use of the interim summation procedure in the present case was ... unjustified" because, in part, the procedure interfered with the defendant's presumption of innocence), and at 154 (Sotomayor, J., dissenting) ("I agree fully with the majority that the use of interim summaries in criminal trials is suspect at best."). The panel could not agree, however, on whether the error was a structural defect or trial error. *Id.*, at 153 (The majority: "Allowing argumentative interim summations in this case was a structural error requiring reversal."), and at 155 (The dissent: "I would affirm the judgment of conviction, holding that the district court's error was trial error, not structural error, and, under the circumstances of this case, harmless."). The majority conclusion was founded on the idea that "the interim summation procedure ... violated appellant's constitutional right to a fair trial." *Id.*, at 153. The dissent's conclusion was founded on the idea that the "interim summation remarks ... are apparent in the record such that a reviewing court can determine the existence of prejudice in a given case." *Id.*, at 156.

In *United States v. Gaines*, the court held that the defendant's presumption of innocence was violated by a jury instruction that said the testifying defendant's interest in the outcome of the case creates a motive to testify falsely. 457 F.3d at 247. In reversing, the court summarily dealt with the issue of whether the error was subject to harmless error, saying in toto on the issue:

> The government argues that any such error was harmless because the evidence against Gaines was "overwhelming." We disagree. This was a close case. Even viewed charitably, the officers' testimony was mistaken in material respects,

> and even if believed, it was not inconsistent with Gaines's claim that the inoperable weapon hidden in the crevice of the cab's back seat was not his. The trial boiled down to the credibility of Gaines's testimony, and thus the erroneous instructions cannot be reasonably considered harmless. *Id.*, at 250.

In *State v. Brown*, the Supreme Court of Washington was confused on how to apply the element of overwhelming and uncontroverted evidence to the question of whether an erroneous accomplice liability instruction is a structural defect. 58 P.3d 889, 894-95 (Wash. 2002), and *id.*, at 900-01 (Sanders, J., dissenting).

In Colorado, the courts state that the dispositive factor to be considered in deciding whether an error is a structural defect is whether or not the error can be quantified, and apparently completely disregard the question of whether the error caused the trial to be unfair. *E.g., People v. Boykins*, 140 P.3d 87, 94 (Colo. App. 2005).

In Florida, one court was squarely confronted with facts very similar to those presented in this case, where the prosecutor stated in closing argument:

> At the beginning of this trial in jury selection and when the judge read to you the law he explained to you that the defendant carries the presumption of innocence and that the State has the burden of proving this case beyond a reasonable doubt. [Mr. Nurse] no longer has that presumption. *Nurse v. State*, 932 So.2d 290, 292 (2d D.C.A. 2005).

"When Nurse's objection to this comment was overruled, the prosecutor repeated, 'He no longer has that presumption' and continued reviewing the evidence the

prosecutor believed proved the case." *Id.* In dicta the court concluded that the conduct was improper, and reversed without any meaningful discussion whether the error was subject to the harmless error rule. *Id.*

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY A. HOOTMAN
2402 Pease Street
Houston, TX 77003
713.247.9548

Attorney for Petitioner

204 S.W.3d 822

Opal Kate MILES, a/k/a Kate O. Miles, Appellant

v.

The STATE of Texas.

No. PD-0436-05.

Court of Criminal Appeals of Texas.

Oct. 25, 2006.

Timothy A. Hootman, Houston, for appellant.

Shirley Cornelius, Asst. D.A., Houston, Matthew Paul, State's Attorney, Austin, for state.

HOLCOMB, J., delivered the opinion of the Court, in which KELLER, P.J., and MEYERS, PRICE, WOMACK, KEASLER, HERVEY, and COCHRAN, JJ., joined.

We granted appellant's petition for discretionary review in order to determine whether the court of appeals erred in its harmless-error review. We hold that the court of appeals did not err.

Our discussion begins with a summary of the relevant facts. In May 2002, a Harris County grand jury returned an indictment charging appellant with felony aggregated theft under Texas Penal Code §§ 31.03(a) and 31.09. In August 2003, the State brought appellant to trial before a petit jury on her plea of not guilty. At the guilt stage of that trial, the State presented nine witnesses and numerous exhibits, and appellant presented eight witnesses and a few exhibits.

The State's evidence at the guilt stage, if believed, established the following: From September 1997 through February 2000, appellant was employed as the bookkeeper for Hope Village, a private residential community for mentally retarded children, in Friendswood. Appellant's duties included managing all of Hope Village's finances, including its payroll. During the period in question, appellant, without authorization from her superiors, awarded herself a substantial retroactive pay raise, numerous paychecks in addition to the ones to which she was regularly entitled, and numerous checks in "reimbursement" for expenditures she never actually made. Appellant also failed, on many occasions, to make the proper deductions from her pay for federal taxes and health insurance. An independent audit conducted in 1999 revealed that appellant had misappropriated, altogether, more than $50,000 of Hope Village's funds.

Appellant's only significant defensive evidence at the guilt stage was her own testimony, in which she denied any wrongdoing. In particular, appellant insisted that her superior at Hope Village had authorized her retroactive pay raise as well as certain unspecified "bonuses," that the "reimbursement" checks had all been legitimate, and that she had "always paid [her] withholding." Appellant could not explain much of the evidence against her, however.

During appellant's closing argument at the guilt stage, the following transpired:

> Defense Counsel: One thing I do want to remind you of at this time is that there is a presumption of innocence throughout the trial. At this point in time, by law, my client is presumed to be innocent. And that –

The State: Judge, I'm going to object to that. Not after the trial's over, I wouldn't think. That's the presumption before the trial starts.

The Court: Sustained.

Defense Counsel: Well, this jury has not rendered its verdict. And until you render [your] verdict, that presumption of innocence, I render [sic] to you, is in effect.

The State: I object to that as not being a proper statement of the law.

The Court: Sustained. Let's move on.

The trial court's written charge to the jury at the guilt stage included the following admonition:

"A Grand Jury indictment is the means whereby a defendant is brought to trial in a felony prosecution. It is not evidence of guilt nor can it be considered by you in passing upon the question of guilt of the defendant. The burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant.

"All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that she has been arrested, confined, or indicted for, or otherwise charged with the offense gives rise to no inference of guilt at her trial. The law does not require a defendant to prove her innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after

careful and impartial consideration of all the evidence in the case.

"The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant."

After deliberating, the jury found appellant guilty as charged in the indictment. The jury later assessed appellant's punishment at imprisonment for nine years and a fine of $2,500.

On direct appeal, appellant argued that she had been denied due process of law, in violation of the Fourteenth Amendment, by reason of the trial court's ruling sustaining the State's objection concerning the presumption of innocence. In particular, appellant argued that the trial court's ruling effectively instructed the jury that, at the close of the evidence, she was no longer presumed innocent. With its ruling, appellant's argument continued, "the trial [court] effectively commented on the weight of the evidence, saying that, yes, indeed, the evidence was strong enough to overcome the presumption that appellant was innocent."

The court of appeals agreed with appellant that the trial court had erred, but the court of appeals held that the error had been harmless beyond a reasonable doubt:

"In this case, the trial court committed [constitutional] error when it sustained the State's objection regarding the presumption of innocence. According to the precedent laid out in *McGrew* [*v. State,* 140 Tex.Crim. 77, 143 S.W.2d 946, 946-947 (1940),] and later followed in *Massey* [*v. State,* 154 Tex.Crim. 263, 226 S.W.2d

856, 860 (1950)], the presumption of innocence does not end when the presentation of evidence closes. . . .

* * *

" . . . Any harm from the [trial] court's error with regard to the presumption of innocence would have been lessened, if not altogether erased, both by the [jury] charge and by the presumption that the jury followed the instructions in the jury charge.

* * *

"Taking into account both the evidence presented against the appellant and the fact that the jury had already been charged [correctly] as to the presumption of innocence, we can say beyond a reasonable doubt that the error committed by the trial court did not contribute to the appellant's conviction. We therefore affirm the judgment of the trial court." *Miles v. State,* 154 S.W.3d 679, 680-683 (Tex.App.-Houston [14th Dist.] 2004).

In a motion for rehearing, appellant, citing *Sullivan v. Louisiana,* 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), argued that the trial court's error had been "structural" and, therefore, not subject to harmless-error review. Her argument proceeded as follows:

"The error in this case is akin to a deficient reasonable doubt instruction [like the one in *Sullivan*] because the trial court [in effect] instructed the jury that the presumption of innocence no longer existed, which [was] like saying that the burden of proof no longer exist[ed]. By instructing the jury that the presumption of innocence no longer exist[ed], the trial court

> [was] in effect saying the burden of proof no longer exist[ed] because it ha[d] already [been] met. A jury charge that has a constitutionally deficient reasonable-doubt instruction is structural error [under *Sullivan*]. Therefore, the court should reverse and remand for a new trial without engaging in a harmful error analysis."

The court of appeals denied appellant's motion for rehearing without issuing a written opinion.

Appellant later filed a petition for discretionary review, which we granted. In her petition and accompanying brief, appellant argues that the court of appeals erred in holding that the trial court's error had been harmless beyond a reasonable doubt. More specifically, appellant argues that (1) under *Sullivan v. Louisiana,* the trial court's constitutional error was a "structural defect" not subject to harmless-error review; (2) the trial court's error, even if not a structural defect, was nonetheless not harmless beyond a reasonable doubt because it amounted to a judicial admonishment that, at the close of the evidence, appellant was no longer presumed innocent; and (3) in any event, the court of appeals failed to utilize the required "totality of the circumstances" standard of harmless-error review.

Under the Due Process Clause of the Fourteenth Amendment, an accused in state court has the right to the "presumption of innocence," *i.e.,* the right to be free from criminal conviction unless the State can prove his guilt beyond a reasonable doubt by probative evidence adduced at trial. *Taylor v. Kentucky,* 436 U.S. 478, 483 n. 12, 485-486, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978); *Madrid v. State,* 595 S.W.2d 106, 110 (Tex.Crim.App.1979). When a jury is told of the presumption, it is told, in effect, to judge an

accused's guilt or innocence solely on the basis of the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody. *Bell v. Wolfish,* 441 U.S. 520, 533, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

Justice Hudson observed correctly, in his concurring opinion in this case in the court of appeals, that the presumption of innocence, as it exists in a court of law,

> " . . . is not a presumption at all in the legal sense; the term presumption of innocence is merely an inaccurate, shorthand description of the right of the criminal defendant to remain inactive and secure, until the prosecution has taken up its burden and produced evidence.
>
> "Thus, when defense counsel [in this case] said 'my client is presumed to be innocent,' he was saying no more than that the burden of proof rests entirely upon the State. Moreover, that burden remains upon the State throughout the trial until the jury reaches a verdict." *Miles v. State,* 154 S.W.3d at 683 (Hudson, J., concurring) (citations and internal quotes omitted).

Thus, as the State now concedes, it was wrong in objecting, during closing argument at the guilt stage of appellant's trial, to her still being "presumed innocent" at that point, and the trial court committed constitutional error when it sustained the State's objection. The question remaining is whether the trial court's error requires reversal of that court's judgment of conviction.

In *Chapman v. California,* 386 U.S. 18, 22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the United States Supreme Court held that some constitutional errors, in the setting of a particular case, "are so unimportant and insignificant

that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." The Court went on to hold that before a federal constitutional error may be deemed harmless, the reviewing court must be able to declare a belief beyond a reasonable doubt that the error did not contribute to the verdict obtained. *Id.* at 24, 87 S.Ct. 824. In later cases, the Court made it clear that a federal constitutional error "contributes" to the verdict obtained if it materially affects the jury's deliberations to the defendant's detriment. *See, e.g., Satterwhite v. Texas,* 486 U.S. 249, 256, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988).

In *Arizona v. Fulminante,* 499 U.S. 279, 307, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), the Supreme Court recognized that the *Chapman* harmless-error rule is applicable only to "trial errors," *i.e.,* isolated and limited errors which occurred during the presentation of the case to the trier of fact, and which may, therefore, be "quantitatively assessed" in the context of the entire trial. The harmless-error rule may *not* be applied to "structural defect[s] affecting the framework within which the trial proceeds," because such structural defects have inherently indeterminate effects on trial proceedings. *Id.* at 310, 111 S.Ct. 1246. Examples of such "structural defects" include "the total deprivation of the defendant's right to counsel at trial, partiality by the judge presiding over the trial, denial of the right to self-representation at trial, exclusion of members of the defendant's race from the indicting grand jury, and denial of the right to a public trial." G. Dix & R. Dawson, *Texas Practice: Criminal Practice and Procedure* § 43.563 (2d ed.2001) (citations omitted). *See also Annual Review of Criminal Procedure,* 35 Geo. L.J. 834-841 (2006) (citing cases on structural defects).

Before a reviewing court may apply the harmless-error rule to an error, it must, of course, decide whether the error is a "trial error" subject to the harmless-error rule. Texas Rule of Appellate Procedure 44.2(a) recognizes this: "If the appellate record in a criminal case reveals constitutional error *that is subject to harmless error review,* the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." (Emphasis added.) When the court of appeals in this case applied the harmless-error rule to the constitutional error in question, that court held implicitly that the error was a "trial error" and not a "structural defect."

As we noted previously, appellant, citing *Sullivan v. Louisiana,* argues that the trial court's error in this case was a structural defect and that, therefore, the court of appeals erred in applying the *Chapman* harmless-error rule to it. We disagree. In our view, the trial court's error did not rise to level of a structural defect; rather, it was a classic trial error that occurred during jury argument, isolated and apparently limited in its impact, and, as we will show, readily subject to a quantitative assessment for harm within the context of the entire trial.

Appellant's reliance upon *Sullivan* is misplaced. In that case, the jurors were erroneously given written instructions that could have been reasonably interpreted to allow a finding of guilt based on a degree of proof less than beyond a reasonable doubt. The question before the Supreme Court was whether that constitutional error was subject to the *Chapman* harmless-error rule. The Court held that it was not, for two reasons. First, the Court explained that, under the *Chapman* harmless-error rule,

the relevant inquiry was whether the guilty verdict obtained "was surely unattributable to the error." Since the Sixth Amendment required a jury verdict of guilty *beyond a reasonable doubt,* the Court continued, a jury charge of the sort given in *Sullivan* did not even produce a "guilty verdict" within the meaning of the Sixth Amendment. "There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless." *Sullivan v. Louisiana,* 508 U.S. at 280, 113 S.Ct. 2078 (emphasis in original). Second, the Court explained that the erroneous jury charge had the effect of denying the defendant his right to trial by jury. "The deprivation of that right," the Court continued, had "consequences that [were] necessarily unquantifiable and indeterminate" and "unquestionably qualifie[d] as 'structural error' [not subject to the harmless-error rule]." *Id.* at 281-282, 113 S.Ct. 2078.

The reasoning in *Sullivan* is not applicable to the instant case. Here, the jurors were not given an erroneous instruction, either written or oral, that might have led them to convict on the basis of a degree of proof less than beyond a reasonable doubt. Indeed, appellant's jury was given completely accurate and thorough written instructions concerning the State's burden of proof and the requisite standard of proof. The most that can be said is that appellant's jury heard the trial court erroneously sustain, in rapid succession, two prosecutorial objections that, from a lay juror's point of view, probably were of uncertain significance. Any uncertainty in the jurors' minds created by the trial court's actions most likely was cleared up by the written jury charge. The error here was

certainly not so pervasive that it vitiated the jury's guilty verdict for Sixth Amendment purposes or denied appellant her right to a trial by jury.

Having held that the trial court's error was not a structural defect, we turn to the question of whether the error was harmless. After examining the entire record, we agree with the court of appeals that the error was harmless beyond a reasonable doubt. Our conclusion is based on several factors. First, the exchange in question between the parties and the trial court was brief and not without ambiguity, with the trial court saying no more than "sustained" (twice) and "let's move on." Given the context, we doubt that the jury placed much significance on the exchange. Second, the State, in its objections to defense counsel's argument, never denied that it had the burden to prove appellant's guilt beyond a reasonable doubt, and, in our view, the jury would not have so interpreted the State's objections. Third, the trial court's charge to the jury included an accurate and thorough explanation of the presumption of innocence and what it means in a court of law, and, in the absence of evidence to the contrary, we will assume that the jury followed its written instructions. *See Colburn v. State,* 966 S.W.2d 511, 520 (Tex.Crim.App.1998). Fourth, the State's evidentiary case against appellant was strong[1] and her defense relatively weak. In sum, we can, and do, declare our belief beyond a

[1] The State's witnesses included the administrator of Hope Village, the president of the foundation that oversaw Hope Village, a fraud examiner from the Harris County District Attorney's Office, the accountant who performed the independent audit of Hope Village's finances, and five of appellant's co-workers at Hope Village. The testimony of these witnesses, taken as a whole, strongly indicated appellant's guilt.

reasonable doubt that the trial court's error did not materially affect the jury's deliberations to appellant's detriment and, thus, did not contribute to the verdict obtained.

We turn finally to appellant's argument that the court of appeals failed to utilize the required "totality of the circumstances" standard of harmless-error review. We agree with appellant that an appellate court must examine the record as a whole when engaged in a harmless-error review. Indeed, "one can hardly evaluate the impact of an error upon a jury decision without considering the totality of the case before the jury." W. LaFave, *et al.*, *Criminal Procedure* § 27.6(b) at 943 (2d ed.1999). Nevertheless, we see nothing in the court of appeals' opinion that indicates that that court did not consider the totality of the record when it performed its harmless-error review. Moreover, since we agree with the court of appeals that the trial court's error was harmless beyond a reasonable doubt, any deficiency in the court of appeals' analysis is of no moment.

We affirm the judgment of the court of appeals.

JOHNSON, J., concurred in the result.

154 S.W.3d 679

Opal Kate MILES a/k/a Kate O. Miles, Appellant,

v.

The STATE of Texas, Appellee.

No. 14-03-00958-CR.

Court of Appeals of Texas, Houston (14th Dist.).

Nov. 4, 2004.

Rehearing Overruled Jan. 13, 2005.

Timothy A. Hootman, Houston, for appellant.

Shirley Cornelius, Houston, for appellee.

Panel consists of Chief Justice HEDGES and Justices FOWLER and HUDSON.

OPINION

ADELE HEDGES, Chief Justice.

Appellant Opal Kate Miles, a/k/a Kate O. Miles, brings this appeal from her conviction of aggravated theft of between $20,000 and $100,000. The jury found appellant guilty, sentencing her to nine years in prison and ordering her to pay a fine of $2,500. The sole issue in this case is whether the trial court erred by sustaining an objection that resulted in the deprivation of her presumption of innocence. We affirm.

Background

From 1997 until the year 2000, appellant worked as the 'Foundation Accountant' for the Hope Foundation for Retarded Children, a non-profit organization located in Friendswood, Texas. The Hope Foundation, founded in 1967, serves as a private, lower-cost alternative to high-priced or state institutions. In the indictment, the grand jury alleged that appellant, over a period of almost two years, stole an amount between $20,000 and $100,000. At the trial on the merits, the State presented evidence that appellant abused her position of trust with the Foundation by, among other things, writing herself checks that were not actual reimbursements, as appellant claimed. During appellant's closing argument, the following exchange took place:

> Appellant: One thing I do want to remind you of at this time is that there is a presumption of innocence throughout the trial. At this point in time, by law, my client is presumed to be innocent. And that –
>
> The State: Judge, I'm going to object to that. Not after the trial's over, I wouldn't think. That's the presumption before the trial starts.
>
> The Court: Sustained.
>
> Appellant: Well, this jury has not rendered its verdict. And until you render verdict, that presumption of innocence, I render to you, is in effect.
>
> The State: I object to that as not a proper statement of the law.
>
> The Court: Sustained. Let's move on.

It is this exchange that serves as the basis of appellant's only point of error.

Discussion

Appellant argues that the court committed reversible constitutional error by sustaining the State's objection, thus depriving her of her right to be presumed innocent until proven guilty.

All criminal defendants are presumed innocent until proven guilty beyond a reasonable doubt. Tex.Code Crim. Proc. Ann. art. 38.03 (Vernon Supp.2004). This presumption lasts through the closing arguments, continuing until the jury retires to the jury room for its deliberation. *Massey v. State,* 154 Tex.Crim. 263, 226 S.W.2d 856, 860 (1950); *McGrew v. State,* 140 Tex.Crim. 77, 143 S.W.2d 946, 946-47 (1940).

A harm analysis is proper when a trial court commits error. *Hawkins v. State,* 135 S.W.3d 72, 76 (Tex.Crim.App.2004). A trial court commits error when it makes a mistake or violates a rule or statute. *Id.* The appellate court should examine the origin of the rule or statute violated to determine whether the error is constitutional in nature; if it is, Rule 44.2(a) of the Texas Rules of Appellate Procedure applies. *Carranza v. State,* 980 S.W.2d 653, 656 (Tex.Crim.App.1998); *Gray v. State,* 133 S.W.3d 281, 284-85 (Tex.App.-Corpus Christi 2004, no pet. h.). Rule 44.2(a) requires reversal in cases in which constitutional error is committed "unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." TEX.R.APP. P. 44.2(a).

In this case, the trial court committed error when it sustained the State's objection regarding the presumption of innocence. According to the precedent laid out in *McGrew* and later followed by *Massey,* the presumption of innocence does not end when the presentation of evidence closes; instead, the presumption remains until the jury enters the jury room to deliberate. *Massey,* 226 S.W.2d at 860; *McGrew,* 143 S.W.2d at 947.

We must evaluate whether the court, in sustaining the objection, committed constitutional error. Even though the presumption of innocence is guaranteed by a Texas statute, the statute itself arises from a constitutional guarantee, that of a fair and impartial trial. *See* U.S. CONST. amend. XIV; TEX.CODE CRIM. PROC. ANN. art. 38.03 (Vernon 2004); *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976) ("[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice"); *see also Oliver v. State,* 999 S.W.2d 596, 599 n. 3 (Tex.App.-Houston [14th Dist.] 1999, pet. ref'd). By twice allowing the jury to hear an incorrect statement of the law, i.e., that the presumption of innocence does not exist past the close of the presentation of evidence, the court violated a rule stemming from a constitutional right and thus committed constitutional error.

Under Rule 44.2(a), we must determine whether, beyond a reasonable doubt, the error contributed to the appellant's conviction. In *Will v. State,* the trial court made an incorrect statement to the jury regarding the presumption of innocence after the close of the State's case and during the defense counsel's opening statement. 794 S.W.2d 948, 950 (Tex.App.-Houston [1st Dist.] 1990, pet. ref'd). The First Court of Appeals held that any error was

either waived by failure to object or, in the alternative, cured by the charge to the jury, which stated that "'[a]ll persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.'" *Id.* at 951.

Citing *Will,* the State submits that appellant waived any error by failing to object. *Id.* However, in *Blue v. State,* the First Court of Appeals determined that constitutional error had been committed when the judge "imparted information to the venire that tainted the presumption of innocence, adversely affecting appellant's right to a fair trial." 64 S.W.3d 672, 673 (Tex.App.-Houston [1st Dist.] 2001, pet. ref'd). The First Court had originally affirmed the trial court in an en banc opinion, citing the defendant's failure to object to the statements as waiver of error. *Blue v. State,* 983 S.W.2d 811 (Tex.App.-Houston [1st Dist.] 1998) (en banc), *rev'd,* 41 S.W.3d 129 (Tex.Crim.App.2000). The Court of Criminal Appeals then reversed the First Court, ruling that the failure to object did not amount to a waiver of error since the trial judge's comments were "fundamental error of Constitutional dimension" and thus required no objection. *Blue v. State,* 41 S.W.3d at 132-33 (Tex.Crim.App.2000) (en banc). On remand, applying Rule 44.2, the First Court found that it could not say beyond a reasonable doubt that the error of the trial court had not contributed to the conviction. 64 S.W.3d at 673. Here, the mere sustaining of the State's objections by the trial court did not approach the extensive and egregious comments made by the trial court in the *Blue* cases.[1]

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[1] Among the trial judge's comments concerning the defendant's decision not to testify were the following:

(Continued on following page)

At trial, the State presented testimony by, among others, an independent auditor of the Foundation's accounts, Kathy Smith. Smith testified that appellant kept the accounts in such a way that documents or records such as payroll reports, deposit information, or petty cash information were inexplicably deleted, missing, or altered. Furthermore, the auditor testified that appellant, as bookkeeper, mingled funds in various accounts and failed to maintain proper internal controls designed to insure safety and to prevent fraud. The auditor also found irregularities in the way appellant reimbursed herself for supposed grocery purchases or deducted (or failed to deduct) her social security, health insurance, and payroll taxes. Smith estimated that appellant had misappropriated between fifty-five and sixty thousand dollars.

Before closing arguments began, the trial court charged the jury. Included in the jury charge was the following:

> Because there are many reasons why defendants do not testify and I have seen many that have nothing to do with their guilt or innocence. . . .
>
> It's like I tell all the juries and I get Sister Teresa and I represent her for mass murder. And she is guilty as driven snow and the jury doesn't know that but the defendant's attorney knows it because she admitted it privately. What am I going to do; I am going to put Sister Teresa on the stand because nobody thinks she would tell a lie. She looks like she would be a very honest person and I can put her on the stand. I could have a defendant as innocent as can be and looks guilty and I wouldn't put her on the stand.

Blue v. State, 41 S.W.3d at 130.

The judge also told the jury that, "in the judge's opinion, very few defendants, over a forty-year period, had been found not guilty." *Id.* at 134 (Mansfield, J., concurring).

> All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that she has been arrested, confined, or indicted for, or otherwise charged with the offense gives rise to no inference of guilt at her trial. The law does not require a defendant to prove her innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

Although *Will* is not controlling,[2] we do find it instructive. 794 S.W.2d at 950. Any harm from the court's error with regard to the presumption of innocence would have been lessened, if not altogether erased, both by the charge and by the presumption that the jury followed the instructions in the jury charge. *See Resendiz v. State,* 112 S.W.3d 541, 546 (Tex.Crim.App.2003); *Colburn v. State,* 966 S.W.2d 511, 520 (Tex.Crim.App.1998). Furthermore, although by law the presumption of innocence carries into the jury room, it is continually rebutted and eroded throughout the trial by the presentation of contrary evidence by the State. While jurors must be impartial deliberators, that requirement does not necessarily mean

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[2] The language in *Will* regarding the presumption of innocence is dicta. Furthermore, *Will* was decided before the legislature rewrote old Rule 81 to create new Rule 44.2, incorporating the constitutional/non-constitutional harm analysis and thus mirroring Federal Rule of Criminal Procedure 52(a). *See* Andrew Murr, Comment, *Texas Attempts to See the Light Through its Own Muddied Jurisprudential Waters: the Difficulties in Choosing the Applicability of Constitutional Versus Non-Constitutional Reversible Error,* 34 Tex. Tech L.Rev. 297 (2003).

that they will enter the jury room without some sense or opinion of the defendant's guilt or innocence. As Justice Frankfurter pointed out, and as noted by Justice Hudson in *Oliver,* we "should not be ignorant as judges of what we know as men." *Watts v. Indiana,* 338 U.S. 49, 52, 69 S.Ct. 1357, 93 L.Ed. 1801 (1949); *Oliver,* 999 S.W.2d at 599.

Taking into account both the evidence presented against the appellant and the fact that the jury had already been charged as to the presumption of innocence, we can say beyond a reasonable doubt that the error committed by the trial court did not contribute to the appellant's conviction. We therefore affirm the judgment of the trial court.

HUDSON, J., concurring.

J. HARVEY HUDSON, Justice, concurring.

The majority holds that the presumption of innocence persists until a verdict is returned by the jury. There is both state and federal authority to support this position, and I fully join the majority in that holding.[1] The Texas Court of Criminal Appeals has stated, for example, that a defendant "is presumed to be innocent until his guilt is proven. That presumption should exist in the minds of the jury when the case begins and continue until all the evidence is in. *He is still presumed to be innocent, in law, until the jury has returned its verdict of guilt.*" *Runnels v. State,* 152 Tex.Crim. 268, 213 S.W.2d 545, 547 (1948) (emphasis added). But while I have no quarrel with the

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[1] *See Martinez v. Court of Appeal of California, Fourth Appellate Dist.,* 528 U.S. 152, 162, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000); *Massey v. State,* 154 Tex.Crim. 263, 226 S.W.2d 856, 860 (1950); *McGrew v. State,* 140 Tex.Crim. 77, 143 S.W.2d 946, 946-47 (1940).

majority's holding, I write separately to address what seems at first to be a logical fallacy in *Runnels,* namely, that jurors must consider the defendant to be actually innocent after hearing all the evidence.

Here, the record shows that after both sides had rested, appellant's counsel informed the jury, "At this point in time, by law, my client is presumed to be innocent." The State's attorney immediately objected and argued, "Not after the trial's over, I wouldn't think. That's the presumption before the trial starts." The trial court sustained the prosecutor's objection, and we find such ruling was error, albeit harmless.

The prosecutor's confusion stems from the fact that the presumption of innocence has no correlation with actual innocence. *See Zimmerman v. State,* 860 S.W.2d 89, 97 (Tex.Crim.App.1993) (holding the presumption of innocence does not carry with it the connotation that a defendant is in fact innocent). In fact, there is nothing about the presumption of innocence that "renders" the defendant innocent. *Rideau v. State,* 751 S.W.2d 248, 250 (Tex.App.-Beaumont 1988, no pet.) Rather, the presumption of innocence is merely "a 'short-hand' substitute for substantive criminal law." *Madrid v. State,* 595 S.W.2d 106, 110 (Tex.Crim.App.1979). It is an expression of the State's burden to prove the defendant's guilt. In other words, it is simply another way of saying the burden of proof rests entirely upon the State. This linkage between the presumption of innocence and the State's burden of proof is seen in statutory references, case law, and legal commentaries. For example, both the Penal Code and Code of Criminal Procedure state:

> "All persons are *presumed to be innocent* and no person may be convicted of an offense unless each element of the offense is *proved beyond a reasonable doubt.* The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial."

TEX. PEN.CODE ANN. § 2.01 (Vernon 1994); TEX.CODE CRIM. PROC. ANN. art. 38.03 (Vernon Supp.2004) (emphasis added). Likewise, in *Rideau v. State,* the court observed that "the *presumption* serves as a reminder to the jury of the *state's burden* to prove its case and as a caution that they are to consider nothing but the evidence in passing upon the accused's guilt." 751 S.W.2d 248, 250 (Tex.App.-Beaumont 1988, no pet.) (emphasis added). Similarly, in *Madrid v. State,* the court remarked, "The so-called *presumption of innocence* is not an inference based on proven fact; rather, it is *an assignment of a burden of proof* prior to trial based on the substantive law requiring the State to prove guilt beyond a reasonable doubt. The presumption of innocence *enters* the courtroom with the defendant in each case." 595 S.W.2d 106, 110 (Tex.Crim.App.1979) (emphasis added). Thus, the authorities seem to agree that the presumption of innocence "is not a presumption at all in the legal sense; the term presumption of innocence is merely an inaccurate, shorthand description of the right of the criminal defendant to remain inactive and secure, until the prosecution has taken up its burden and produced evidence." 29 AM.JUR.2D *Evidence* § 236 (2004).

Thus, when defense counsel said "my client is presumed to be innocent," he was saying no more than that the burden of proof rests entirely upon the State. Moreover, that

burden remains upon the State throughout the trial until the jury reaches a verdict.

On the other hand, proof of guilt must be established progressively during the course of a trial. Thus, while the prosecution slowly builds its case through the admission of testimony and evidence offered at trial, it is simultaneously meeting its burden and, thus, eroding the presumption of innocence. Accordingly, when the evidence concludes, and both sides have rested, individual jurors will, in all probability, have already reached a conclusion regarding the guilt or innocence of the defendant. This is perfectly proper, and so long as the jurors understand that the burden of proof has never shifted from the State, they can honestly say that they presume the defendant to be innocent even while being convinced of his guilt beyond a reasonable doubt.

Accordingly, the "presumption of innocence" is a term of art, and jurors are very likely to unfairly misinterpret the expression to the State's detriment. For example, if every juror, by law, had to believe the defendant is *actually* innocent prior to reaching a verdict, then every juror would have to believe the defendant is innocent when voting on a verdict. And if every juror believed the defendant is innocent at the time he or she votes, what must the verdict inevitably be? However, the prosecutor and trial judge were free to explain to the jury that the presumption of innocence is merely a short-hand expression regarding the State's evidentiary burden and not a suggestion or intimation of the defendant's actual innocence.

As a pure statement of the law, defense counsel's remarks were entirely correct, and the trial court erred in sustaining the State's objection. The error, however, as the

majority ably concludes, was harmless beyond any reasonable doubt. With these observations, I respectfully concur.